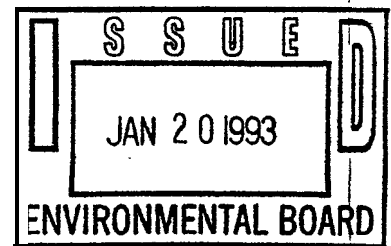


*Cabot*



VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151

Re: Cabot Creamery Cooperative, Inc.  
Application #5W0870-13-EB

SUPPLEMENTAL MEMORANDUM OF DECISION

This decision pertains to preliminary issues raised in an appeal of a permit issued for land application of dairy processing wastewater and washwater resulting from the operation of a cheese production plant located in Cabot.

BACKGROUND

The background of this matter is set forth in the Environmental Board's decision issued December 23, 1992. That decision addressed various preliminary issues, is supplemented and revised by today's decision, and is incorporated by reference.

The December 23 decision discussed but did not decide a petition by Richard Scheiber (the Appellant) for party status and therefore appeal rights with respect to 10 V.S.A. § 6086(a)(9)(K) (public investments and facilities). The decision stated that the Board would deliberate further on the Appellant's request and issue a supplemental memorandum of decision.

The Board deliberated on December 30 by teleconference call. Members participating were Chair Elizabeth Courtney, Ferdinand Bongartz, Terry Ehrich, Lixi Fortna, Arthur Gibb, Samuel Lloyd, and William Martinez. Chair Courtney and Members Bongartz and Ehrich voted in favor of granting the Appellant party status and appeal rights on Criterion 9(K). Members Fortna, Gibb, Lloyd, and Martinez voted against such a grant. Accordingly, pursuant to 1 V.S.A. § 172 and 10 V.S.A. § 6021(a), the Appellant's request fails for lack of a majority (five members) of the Board. Since the District #5 Commission denied the Appellant party status on Criterion 9(K), that denial stands. The results of the Board's deliberation were orally communicated to the Appellant and the Applicant on January 4, 1993.

On January 4, 1993, the Appellant filed a motion to alter and clarify the Board's decision of December 23, 1992. Also on that date, Jessica Miller filed a memorandum seeking clarification of that decision. On January 7, Ms. Miller filed a memorandum further explaining her earlier memorandum and a request for party status on Criterion 9(K). On January 8, the Appellant filed a memorandum asking the Board to reconsider his request for party status on Criterion 9(K) and to delay taking evidence until a ninth Board member is

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appointed. Also on that date, the Applicant filed a Memorandum in Response to Submissions of Richard Scheiber and Jessica Miller and in Support of Motion to Alter.

On January 12, 1993, the Appellant and Ms. Miller filed additional submissions. On January 14, the Applicant filed a Memorandum Requesting Extension of Deadline for Filing of Prefiled Testimony and Responding to Party Status Request of Jessica Miller. The Board deliberated by teleconference call on January 14 and January 19.'

## DECISION

The issues raised by the various submissions made since the December 23 decision, and our decisions concerning them, are as follows:

### A. Reconsideration of the Elements of Collateral Estoppel

The Applicant asks us to reconsider the conclusion in our December 23 decision that the elements of collateral estoppel are met by that portion of this application which seeks to delete a condition in a prior permit requiring the Applicant to construct a waste treatment facility. The Applicant contends that a permit amendment is always allowed for a substantial change in a permitted project.

During our January 14 deliberation, we unanimously declined to reconsider our conclusion that the elements of collateral estoppel are met. Board Rule 34 requires a permit amendment for a substantial or material change in a permitted project but does not state that all such changes must be allowed. If the doctrine of collateral estoppel, which encourages finality in judicial and administrative litigation, is to have any meaning, it must operate to bar some substantial and material changes to permitted projects. We discuss immediately below what types of change should be allowed.

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*'The Board initially was scheduled to deliberate during a meeting which took place on January 13 but decided not to do so because, due to a heavy **snowstorm** on that date, only five members were able to attend the meeting, and three members unable to attend had participated in the December 23 decision.*

B. Reconsideration of Additional Burden of Proof

All parties ask us to reconsider and clarify an additional burden of proof placed on the Applicant in our December 23 decision as a condition of waiving the doctrine of collateral estoppel.

During our January 19 deliberation, we reconsidered the additional burden of proof. We conclude that the Applicant is required to show, during the evidentiary hearings scheduled in this matter, that certain types of changes have occurred and that the current application is a direct outgrowth of such changes. The allowable types of changes are-those that preclude the need for, or construction of, a waste treatment facility. Such changes may consist only of: (a) changes in factual or regulatory circumstances beyond the control of the Applicant; (b) changes in the construction or operation of its cheese production plant, not reasonably foreseeable at the time the Permit was issued; or (c) improvements in technology or treatment methodology for dairy wastes.

These limitations are necessary to uphold the finality of Act 250 decisions while at the same time allowing some flexibility in the Act 250 process. Thus, the limitations seek to ensure that collateral estoppel is waived only where changes occur that are beyond an applicant's control or based on good faith actions, and not based on applicant's desire to do away with a condition which it simply does not wish to fulfill. In this regard, we do not believe that a permissible change can include the Applicant's desire merely to delete the condition requiring a waste treatment facility, without the justifications described above, because that effectively would mean that conditions can always be re-litigated.

Our December 23 decision included language regarding comparing the impacts of a waste treatment facility with the impacts of the proposed project before us. However, in that decision, we also noted that the District Commission had not approved a final design for that facility. Thus, the referenced comparison is not practical and we will delete such discussion from the decision.

Pursuant to our reconsideration of the additional burden of proof imposed in the December 23 decision, we issue revised pages 11 through 13 to that decision

In addition, in response to a request made by the Appellant, we clarify that the proof shall be made to us through testimony offered during the hearings scheduled in this matter for February 24 and 25, 1993, and that we will decide

whether the burden has been met. However, we will not require the Applicant to meet its additional burden of proof prior to taking testimony on whether the criteria at issue are met. Instead, we will take all testimony at the same time.

C. Party Status on Criterion 9(K)

The Appellant asks us to reconsider his request for party status on Criterion 9(K). During our January 14 deliberation, we decided not to reconsider that request because such reconsideration will not result in a change to our vote of December 30. Accordingly, pursuant to our vote of that date, the District Commission's decision on this issue stands, and Criterion 9(K) is dismissed from the Appellant's appeal for lack of party status.

During our January 14 deliberation, we also decided to deny Ms. Miller's request for party status on that criterion. As evidenced by the District Commission's final decision on this application, Ms. Miller had party status before the District Commission only on Criterion 8 (aesthetics) and did not seek party status before the District Commission on Criterion 9(K). She also did not file an appeal with respect to Criterion 9(K) within 30 days pursuant to 10 V.S.A. § 6089(a). Moreover, while the Appellant did timely file an appeal with respect to that criterion, the criterion is no longer part of his appeal. Even if it were, Ms. Miller's party status request would be untimely under Board Rule 14(B)(2) because it was not made on or before the date of the prehearing conference held in this matter on November 2, 1992.

D. Delay of Taking Evidence/Filing Prefiled Testimony

The issues discussed below were decided during our January 19 deliberation.

The Appellant asks us to delay taking evidence because there are presently only eight members appointed to the Board. The Board does consist of nine members. 10 V.S.A. § 6021(a). Presently the ninth seat is vacant and the Governor is considering who should fill it. However, under 1 V.S.A. § 172, only five members of the Board are required for a quorum, and we will proceed with the hearings as scheduled.

The Applicant requests that we allow more time for filing prefiled testimony. Our December 23 decision set a deadline of January 22, 1993 for filing such testimony. In view of the timing of today's decision and the changes we are making to the Applicant's additional burden of proof, the schedule for filings before the hearing is revised in accordance with the order below.

#### ORDER

1. The Applicant's request to reconsider the applicability of the elements of collateral estoppel is denied.
2. The requests of the Appellant and the Applicant to reconsider the additional burden of proof imposed on the Applicant are granted. On reconsideration, the Board issues revised pages 11 through 13 to its December 23 decision (enclosed). To the extent that parties request alterations in that decision different from the alterations the Board is actually making, said requests are denied.
3. The Appellant's requests regarding clarification of how and when the Applicant's burden of proof shall be met, and who shall decide whether it is met, are granted as discussed above.
4. The Appellant's request that the Board require the Applicant to meet its additional burden of proof prior to taking evidence on the application's compliance with the Act 250 criteria is denied.
5. The Appellant's request that the Board reconsider his petition for party status on Criterion 9(K) is denied. Criterion 9(K) is dismissed from this appeal for lack of party status.
6. Jessica Miller's petition for party status on Criterion 9(K) is denied.
7. The Appellant's request that the Board delay the taking of evidence in this appeal until a ninth member is appointed is denied.
8. The Applicant's request to change the dates for filing testimony is granted as follows:
  - a. The deadline contained in paragraph 4 of the November 10, 1992 prehearing order is extended to February 4, 1993.

- b. The deadline contained in paragraph 5 of the November 10, 1992 prehearing order is extended to February 18, 1993.
- c. The deadline contained in paragraph 6 of the November 10, 1992 prehearing report is changed to February 18, 1993, and modified to apply only to objections to initial prefiled testimony. Objections to prefiled rebuttal testimony may be made orally during the hearings scheduled for February 24 and 25, 1993.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair  
Ferdinand Bongartz\*

Terry Ehrich\*

Lixi Fortna

Arthur Gibb

Samuel Lloyd

William Martinez

Steve E. Wright\*\*

\*Members Bongartz and Ehrich dissent from the decision not to reconsider the Appellant's petition for party status on Criterion 9(K).

\*\*Member Wright was not available for, and did not participate in, the deliberation on January 14, 1993. He did participate in the January 19, 1993 deliberation and voted in favor of the decisions made on that date.

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